U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 2 8 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was approved by the Director, Nebraska Service Center (Director). The Director later revoked the approval of the petition. The petitioner appealed the Director's decision, which is now before the Administrative Appeals Office (AAO). The appeal will be dismissed and the approval of the petition will remain revoked.

The petitioner is a healthcare recruitment and placement services company. It seeks to permanently employ the beneficiary in the United States as a computer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor.

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on August 8, 2010. The accompanying labor certification – which was filed with the DOL on December 8, 2009 and certified on May 20, 2010 – set forth the minimum education and experience required for the job in Part H, lines 4, 4-B, 6, and 9 of the ETA Form 9089. The requirements include a bachelor's degree in engineering, computer science, or business, or a foreign educational equivalent, plus five years of experience in the job offered.

Documentation submitted with the petition included copies of the beneficiary's post-secondary academic record in India, which consisted of the following pertinent credentials:

- A Diploma in Electrical Engineering from the [redacted] on December 12, 1995, following a three-year, six semester course of studies that began in 1991 and culminated with a final examination in August 1994.

- A Bachelor of Arts with a concentration in political science, public administration, and sociology from [redacted], conferred in Hyderabad on November 28, 1998, following two years of study and examinations in 1995 and 1996.

- Certification from the [redacted] (India) that the beneficiary passed Sections A and B of the of the Institution Examinations in the Electrical Engineering Branch in Winter 1996 and Winter 2002, and became a Member of the Institution on February 27, 2003.

Also submitted with the petition was a letter from an official in the [redacted], dated February 17, 2010, stating that the beneficiary had been employed full-time as an Assistant Engineer from June 17, 1998 to September 24, 2006, and as a Junior Engineer from September 25, 2006 to June 5, 2008 – a total of 10 years. The letter described the duties performed by the beneficiary in these jobs.

The petition was approved on November 8, 2010.

On December 12, 2012, the Director issued a Notice of Intent to Revoke (NOIR) the approval of the petition on the ground that the beneficiary did not appear to be eligible for classification as an advanced degree professional under the regulations because a Bachelor of Arts degree in India is not equivalent to a U.S. baccalaureate degree.

In response to the NOIR, counsel for the petitioner cited a previously submitted evaluation from in New York City, dated April 2009, which rated the beneficiary's passage of Sections A and B of the examinations conducted by the as equivalent to a U.S. Bachelor of Science in Electrical Engineering. Counsel also cited a letter in the record from an official in the Indian Department of Education, dated August 16, 1978, who stated that the passage of Sections A & B of the Institution Examinations of the is recognized by the Government of India "at par" with a bachelor's degree in engineering from a recognized Indian university.

On February 22, 2013, the Director issued a decision revoking the approval of the petition. The Director found that the beneficiary's Bachelor of Arts degree from in India was not equivalent to a U.S. bachelor's degree because it did not require four years of study, the standard requirement of a U.S. bachelor's degree, citing *Matter of Shah*, 17 I&N Dec. 224, 245 (Reg. Comm. 1977). Nor was the beneficiary's passage of Sections A and B of the Institution Examinations of the equivalent to a U.S. bachelor's degree for the purposes of the instant petition because the credential is not a degree from a college or university. Thus, the beneficiary did not have the requisite education to be eligible for classification as an advanced degree professional and to qualify for the job of computer analyst under the terms of the labor certification. In addition, the Director found that the record failed to establish that the beneficiary had the requisite five years of qualifying experience. According to the Director, the beneficiary's ten years of experience as an Assistant Engineer and a Junior Engineer with the did not constitute experience in the job offered of computer analyst.

The petitioner filed an appeal, accompanied by a brief from counsel and an additional evaluation of the beneficiary's Indian education from the American Association of Collegiate Registrars and Admissions Officers (AACRAO).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Based on the evidence of record, the AAO will withdraw the Director's finding that the beneficiary does not have five years of qualifying experience. The AAO has reviewed the job duties of the computer analyst position and the skills required to perform the offered position as described in the labor certification, compared them to the beneficiary's duties as an Assistant Engineer and a Junior Engineer with the from 1998 to 2008, as described in the letter from a Ministry official in 2010. Despite the different titles, based on the similarity of the duties and required special skills between the two positions, the AAO concludes that the beneficiary possessed over five years of experience in the job offered by the priority date. Accordingly, the petitioner has overcome this ground of the denial on appeal.

The remaining issue on appeal is whether the beneficiary's educational credentials are sufficient to satisfy the educational requirements of the advanced degree professional classification and the educational requirements of the offered position as set forth on the labor certification.

At this point, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[1] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

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[1] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
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> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

In the instant case, the petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States.[2] The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the INS responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus five years of progressive experience in the specialty). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[3] In order to have experience and education equating to an

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[2] Section 203(b)(2) of the Act also provides immigrant classification to aliens of exceptional ability. There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

[3] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree (plus five years of progressive experience in the specialty). *See* 8 C.F.R. § 204.5(k)(2).

The degree must also be from a college or university. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." The AAO cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. *See Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *per APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction). Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991).[4]

The documentation of record shows that the only educational credential earned by the beneficiary from a college or university is his Bachelor of Arts from [redacted] in India. It was not a four-year degree, however, and was not in the field of engineering, computer science, or business. The beneficiary's academic records appear to show that he earned the degree after just two years of study.

In the appeal brief, counsel claims that the beneficiary's degree from [redacted] is a bachelor's degree in engineering and is equivalent to a four-year bachelor of science in engineering from a U.S. college or university. The beneficiary's degree is specifically called a Bachelor of Arts, however, and lists his coursework as English and Hindi (first year), followed by political science, public administration, and sociology (second year). Neither the degree nor the accompanying transcripts from [redacted] list any coursework in the field of engineering.[5] Moreover, the academic records clearly show that the beneficiary's Bachelor of Arts was not a four-year degree.

The evaluation from AACRAO submitted on appeal does not conclude that the beneficiary's degree is equivalent to a U.S. bachelor's degree in engineering, computer science, or business. Rather, it

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[4] *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

[5] Counsel asserts that the [redacted] evaluation of the beneficiary's U.S. educational equivalency was based on the beneficiary's studies at [redacted]. The [redacted] evaluation, however, was based exclusively on the beneficiary's credential from the [redacted] (India). It did not mention the beneficiary's university studies.

states that the degree is comparable to three years of undergraduate study in social sciences at an accredited college or university in the United States. This evaluation accords with the information in AACRAO's database – the Educational Database for Global Education (EDGE) – which states generally that a Bachelor of Arts degree from an Indian university is awarded upon completion of two to three years of study and is comparable to two to three years of university study in the United States.[6] Thus, the AACRAO evaluation of the beneficiary's Bachelor of Arts degree does not support counsel's claim that it is equivalent to a four-year bachelor of science in engineering from a U.S. college or university.

Counsel also submits a "follow-up" brief containing "minor corrections to the appeal due to administrative error." This supplement claims that the beneficiary's "Sections A & B Examination Certificate in Electrical Engineering from the [redacted] [is] equivalent to a four year Bachelor of Science in Engineering from a regionally accredited college or university in the United States."

The AACRAO evaluation submitted on appeal also states that the beneficiary's Associate Membership in the [redacted] (India) after passing Sections A and B of its Electrical Engineering Branch examinations is comparable to a bachelor's degree in engineering from a

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[6] According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries." http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[6] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* U.S. Citizenship and Immigration Services (USCIS) considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.

In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

regionally accredited college or university in the United States. This evaluation of the beneficiary's credential is consistent with the information in AACRAO's database – EDGE.

However, while Associate Membership in the (India) may be regarded as comparable to a U.S. bachelor's degree for certain purposes, like admission to graduate schools or applying for certain jobs, it is not a foreign equivalent degree to a U.S. bachelor's degree for the purpose of visa classification as an "advanced degree professional" under the Act because the credential is not a degree from a college or university. As previously mentioned, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." The beneficiary's certificate of examination passage and membership in the (India) does not meet the requirement of a college or university degree.[7]

Counsel cites the previously submitted evaluation from , authored by The evaluation states that the Institution of Engineers is a professional organization, and that the beneficiary's coursework "significantly parallel those upheld by accredited colleges and universities in the United States." The evaluation also states that the beneficiary "satisfied similar requirements to the completion of a Bachelor of Science Degree in Electrical Engineering from an accredited institution of tertiary education in the United States." However, the evaluation does not state that the beneficiary possessed a degree from a foreign college or university that is the equivalent to a U.S. Bachelor of Science in Electrical Engineering. The evaluation analyzes a credential that does not qualify as a college or university degree, and thus cannot be viewed as equivalent to a U.S. bachelor's degree for the purpose of "advanced degree professional" visa classification.

Therefore, the petitioner failed to establish that the beneficiary has a foreign equivalent degree to a U.S. bachelor's degree in engineering, computer science, or business. Thus, the beneficiary is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act.

In addition, to be eligible for approval as an advanced degree professional, the beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834.

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[7] Similarly, the beneficiary's 1995 Diploma in Electrical Engineering from the following a three-year program of study (which the AACRAO evaluation rates as comparable to one year of undergraduate study in the United States) does not meet the requirement of a college or university degree for the purpose of "advanced degree professional" visa classification.

USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The key to determining the job qualifications is found in Part H of the ETA Form 9089. This section of the labor certification application describes the minimum education, training, and experience required for the job offered. In this case, the labor certification states that the offered position of computer analyst requires a U.S. bachelor's degree in engineering, computer science or business, or a "foreign educational equivalent" (Part H, lines 4, 4-B, and 9). The labor certification specifically states that an alternate combination of education or experience is not acceptable.

The beneficiary does not have a U.S. bachelor's degree or an equivalent foreign degree in engineering, computer science, or business. Instead, he has an examination certificate from a professional association, that, while comparable to a U.S. degree, is not a degree from a foreign college or university. Since it is not a degree from a college or university, the beneficiary does not satisfy the minimum educational requirement of the labor certification to qualify for the proffered position. For this reason as well, the petition cannot be approved.

In summary, the AAO affirms the director's determination that the beneficiary does not possess a U.S. bachelor's degree or a foreign equivalent degree as required by the terms of the labor certification and to eligible for classification as an advanced degree professional under section 203(b)(2) of the Act. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.